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FILED
APR 2 5 2008
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SUPREME COURT, U.S.

No. 07-1096

In the Supreme Court of the United States

STROMAN REALTY, INC., PETITIONER,

v.

DEAN MARTINEZ, SECRETARY, ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO
Solicitor General
MARY ELLEN MARGARET WELSH*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2106

**Counsel of Record*

Counsel for Respondent

QUESTIONS PRESENTED

Absent "exceptional circumstances," such as a "flagrantly and patently" unconstitutional state law, *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny require that federal courts abstain from interfering in an ongoing state proceeding that is judicial in nature, serves an important state interest, and provides an adequate opportunity to assert the federal claim. Under *Hicks v. Miranda*, 422 U.S. 332 (1975), a state proceeding is "ongoing" for *Younger* purposes so long as it is initiated "before any proceedings of substance on the merits have taken place in the federal court."

The questions this case presents are:

1. Whether the district court properly abstained from petitioner's Commerce Clause action to enjoin enforcement of facially-neutral state laws in a state disciplinary proceeding against petitioner.

2. Whether this Court should resolve a question not raised in the lower courts and on which petitioner alleges no split in authority: whether *Hicks* applies to the disciplinary proceeding against petitioner, who may raise its constitutional claim if it seeks judicial review of any adverse administrative decision.

3. Whether this Court should resolve two questions not raised in the lower courts, on which petitioner has alleged no split in authority, and that are not ripe: (1) whether *Younger* would require petitioner to exhaust its state law remedies by seeking judicial review if petitioner receives an adverse ruling in the pending disciplinary proceeding; and (2) whether an adverse administrative decision would have preclusive effect if petitioner did not seek judicial review.

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BRIEF IN OPPOSITION

This Court's review is not necessary either to ensure compliance with the Court's decisions or to resolve any split in authority.

It is undisputed that *Younger* and its progeny require abstention for an ongoing state administrative proceeding that is judicial in nature, serves an important state interest, and provides an opportunity to assert the federal claim. The Seventh Circuit properly applied this settled test to affirm the district court's decision to abstain here, where petitioner raised a Commerce Clause challenge to respondent's regulation of petitioner's unlicensed real estate brokerage services in Illinois, when petitioner was the subject of an ongoing Illinois disciplinary proceeding under that regulation. Petitioner asserts that the Seventh Circuit's decision conflicts with Third and Fourth Circuit cases holding that comity did not require abstention for facial Commerce Clause challenges to facially discriminatory statutes, but the lower courts here correctly distinguished such attacks from petitioner's challenge to facially neutral state laws furthering legitimate state interests. In any event, more recent Fourth Circuit case law (not cited by petitioner) makes clear that that court would reject the *per se* prohibition on abstention in Commerce Clause cases that petitioner uses as the basis for its alleged split. And there is no confusion on this issue, given that other circuit courts consistently abstain under *Younger* in Commerce Clause cases.

Petitioner also asks this Court to decide a question not raised below — whether *Hicks* applies when the

initial state proceeding is administrative — but petitioner does not allege a split in authority on this question and omits cases that have applied *Hicks* in precisely these circumstances. Petitioner's remaining two-pronged question likewise concerns issues not raised below and over which petitioner does not allege any split in authority. Moreover, these hypothetical questions — whether *Younger* requires petitioner to seek judicial review if the Department's decision is adverse and whether any such adverse administrative decision would have preclusive effect if petitioner did not — may never ripen, for petitioner may prevail in the administrative proceeding or on its pending state mandamus action. Petitioner's unripe request for advice on its future litigation strategy should be summarily rejected.

This case is a poor vehicle to answer any of the questions presented in any event. First, even an outright victory in this Court would have no effect on the lower court's decision to abstain, for even without *Younger*, abstention is appropriate here on the alternative grounds that federal courts must avoid unauthoritative guesses about Illinois law and unnecessary constitutional decisions. Abstention also may be appropriate here under general principles governing the award of equitable relief, given petitioner's available legal remedies in state court. Second, petitioner already has a federal forum for its analogous Commerce Clause claims against California and Florida regulators, whose Fifth Circuit appeal is pending.

In sum, petitioner identifies no unsettled question of federal law, or cognizable split in authority, or

conflict with this Court's precedents. Instead, it merely alleges error in the Seventh Circuit's straightforward application of *Younger*.

For all these reasons, the petition should be denied.

STATEMENT

1. As of 1997, Illinois residents owned over 51,000 timeshares throughout the United States. Pet. App. 32a. In addition, Illinois contains three timeshare resorts. Pet. App. 32a.

The Illinois Department of Financial and Professional Regulation, of which respondent is director, enforces the Illinois Real Estate Timeshare Act (765 ILCS 101/15-70(a) (2006)), which in turn incorporates the Illinois Real Estate License Act (225 ILCS 454/20-10(a) (2006)) (together, the Act). The Act is intended to evaluate the competence of those engaged in the real estate business and to regulate this business to protect the public. 225 ILCS 454/1-5 (2006). To this end, the Act generally requires Illinois licensure for those who provide brokerage services to Illinois residents or involving Illinois properties. 225 ILCS 454/1-10, 454/5-15 (2006). Brokers and salespeople must satisfy education requirements, pass an exam, and pay a bi-annual licensing fee. 225 ILCS 454/5-25, 454/5-30, 454/5-35, 454/5-65 (2006). They also must meet continuing education requirements, which may be satisfied out-of-state. 225 ILCS 454/5-70, 454/5-75 (2006). No in-state office is required if a broker maintains an active broker's license in its state of domicile and agrees to be subject to service of process for its licensed activities in Illinois. 225 ILCS 454/5-45 (2006). The Act also prohibits paying

compensation to unlicensed persons for licensed activities or filing suit for such compensation. 225 ILCS 454/10-15 (2006).

Unlicensed brokerage activity is a Class C misdemeanor and may result in a fine of up to $25,000 for each offense. 225 ILCS 454/5-15, 454/20-10, 454/20-60, 454/20-80 (2006). The Department investigates alleged unlicensed brokerage activity and conducts disciplinary proceedings, which may include a formal hearing; its final administrative decision is subject to judicial review. 225 ILCS 454/20-10, 454/20-60, 454/20-75 (2006). An action to enjoin unlicensed practice in Illinois also may be brought directly in state court, on behalf of the People of Illinois. 225 ILCS 454/20-80 (2006).

2. Petitioner engages in the interstate and international business of brokering timeshare resales and bills itself as the world's largest timeshare resale broker. Pet. App. 2a-3a, 14a, 35a. It advertises its services daily in international, national, regional, and local media, as well as on its active website, and it targets buyers and sellers with over 4.5 million pieces of direct mail annually, sent to recipients in Illinois and elsewhere. Pet. App. 15a, 37a-38a. Its business is based on a computer marketing system tailored to the timeshare resale market, with a database of over 1 million buyers, sellers, and renters. Pet. App. 36a. Petitioner provides its services via mail, telephone, and internet, and its transactions frequently involve parties or properties in two or more states. Pet. App. 14a-15a. Each seller pays an up-front fee for a three-year advertising agreement and, in the event of a sale, pays petitioner a commission. Pet. App. 14a.

3. On May 11, 2005, the Department sent petitioner a cease-and-desist letter, stating that it had received a complaint from an Illinois citizen who retained petitioner for the purpose of reselling a timeshare interest. Pet. App. 61a-64a. The letter explained that representation of an Illinois seller requires an Illinois license, which petitioner did not have. Pet. App. 61a-62a. The letter further stated that, in addition to soliciting Illinois residents as timeshare sellers, buyers, lessors, or lessees, petitioner had client relationships with (1) owners of timeshare properties located in Illinois; (2) the complainant, an Illinois resident who was a timeshare seller; and (3) timeshare developers whose business offices are located in Illinois. Pet. App. 63a. Because these activities constituted the practice of real estate brokerage in Illinois, the letter explained, petitioner had to either obtain an Illinois real estate license or cease and desist these activities. Pet. App. 63a.

On August 1, 2005, respondent issued an administrative complaint against petitioner, seeking a civil penalty. Pet. App. 71a-75a. The complaint alleged that petitioner had acted as a timeshare resale agent in Illinois between August 1, 2000 and August 2005 without a proper license by (1) entering into client relationships to serve as a timeshare resale agent for timeshare developers with offices in Illinois and with owners of timeshare properties physically located in Illinois; (2) issuing direct mail to Illinois citizens offering its services as a timeshare resale agent; and (3) holding itself out as a timeshare resale

agent in advertising in local Illinois newspapers. Pet. App. 72a-74a. The disciplinary proceeding is pending.[1]

4. Meanwhile, about a month after the Department's cease-and-desist letter and about six weeks before the Department issued its complaint, petitioner commenced this action in the Southern District of Texas, alleging that enforcement of the Act against it violated the dormant Commerce Clause. Pet. App. 3a, 28a-60a. It sought to enjoin respondent "from enforcing [the Act] and the regulations thereunder against [petitioner] in the conduct of its business in the timeshare resale market . . . ." Pet. App. 59a. The district court found that it lacked personal jurisdiction over respondent and transferred the matter to the Northern District of Illinois.[2]

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[1] Petitioner filed a state mandamus action, seeking dismissal of the administrative proceeding for lack of personal jurisdiction, but that action was dismissed for failure to exhaust administrative remedies. *Stroman Realty, Inc., v. Lyons*, No. 07 CH 09985 (Cir. Ct. Cook County). Petitioner's appeal from that dismissal is pending in the Appellate Court of Illinois, where it is fully briefed. *Stroman Realty, Inc., v. Lyons*, No. 1-07-2276. On April 14, 2008, an administrative law judge denied petitioner's motion to stay the Department proceeding pending resolution of that appeal.

[2] Petitioner filed a similar suit against respondent's Arizona counterpart, in which the Fifth Circuit recently upheld dismissal for lack of personal jurisdiction. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008). Petitioner also filed similar

Stroman Realty, Inc. v. Grillo, 2006 WL 492458 (S.D. Tex., Feb. 28, 2006).

The district court granted respondent's motion to dismiss the case on *Younger* abstention grounds. Pet. App. 12a-26a. In finding that the state proceeding served a traditional and important state interest in regulating real estate professionals, the district court distinguished the state interest at issue in *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348 (4th Cir. 2005), which the Fourth Circuit held was to limit access to the interstate market. Pet. App. 21a-22a.

5. The Seventh Circuit affirmed unanimously. Pet. App. 1a-11a.

Addressing *Younger*'s first factor and noting that petitioner agreed the Department proceeding was judicial in nature, the court rejected petitioner's argument that the proceeding was not "ongoing" for *Younger* purposes because it commenced after petitioner filed its federal complaint. Pet. App. 6a. Citing *Hicks*, the court reasoned that the Department proceeding was "ongoing" because the administrative complaint was filed even before the answer was due in the federal case, so no "proceeding of substance on the merits" had yet occurred there. Pet. App. 6a. Next,

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suits against respondent's Florida and California counterparts, whose appeal from the entry of summary judgment against them is pending. *Stroman Realty, Inc. v. Marstiller*, Nos. 05-20803, 05-20804 (5th Cir.) (oral argument heard April 30, 2007). *Younger* abstention is not among the issues raised in that appeal.

the court addressed the third *Younger* factor, finding "no reason why Stroman's dormant Commerce Clause claim could not also be adequately addressed on judicial review in the event of an adverse administrative decision," relying on its own prior decision that judicial review of the Department's decisions satisfies this element of *Younger*. Pet. App. 6a (citing *Green v. Benden*, 281 F.3d 661 (7th Cir. 2002)).

The court then turned to petitioner's argument on the second *Younger* factor: that the State's interest in regulating and disciplining real estate brokerage services provided to Illinois residents or involving Illinois properties was insufficient because petitioner's Commerce Clause claim implicated an important federal interest. Pet. App. 7a. The court observed that the same argument had been rejected in *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), which held that "'[t]he mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction.'" Pet. App. 7a (quoting *NOPSI*, 491 U.S. at 364-65, which cited *Younger*, 401 U.S. at 53). Rather than "look[ing] narrowly to [the State's] interest in the *outcome* of the particular case — which could arguably be offset by a substantial federal interest in the opposite outcome," the court emphasized, *NOPSI* instructed that *Younger* requires federal courts to "'look to the importance of the generic proceeding to the State.'" Pet. App. 7a-8a (quoting *NOPSI*, 491 U.S. at 365) (emphasis in *NOPSI*). The court also found significant that the Department regulates conduct that is not under even partial federal control. Pet. App. 9a.

Like the district court, the Seventh Circuit rejected petitioner's reliance on *Harper*, observing that the Fourth Circuit had emphasized that the state law there "did not reflect a valid interest in preventing the improper disposal of waste, but rather, '*by its very nature* serve[d] to impede interstate commerce'" by restricting interstate access to the waste removal market. Pet. App. 8a (quoting *Harper*, 396 F.3d at 354-55 (emphasis in *Harper*)). The Seventh Circuit contrasted West Virginia's facially discriminatory state interest in *Harper* with the "legitimate and substantial interest [of Illinois] in setting and enforcing the standards for those who deal with property sales involving its citizens." Pet. App. 8a-9a. Based on the complaint before it, the court concluded, "[a]t best, Stroman has argued that the statutes the Department seeks to enforce have the type of *incidental* effects that a valid licensing scheme has on out-of-state companies." Pet. App. 9a (emphasis in original).

Lastly, finding that petitioner had made no showing of "exceptional circumstances," such as that the Department proceeding "flagrantly and patently" violated an express constitutional prohibition, the court held that *Younger* abstention was proper. Pet. App. 9a-10a.

6. Petitioner's petition for panel rehearing and en banc review was denied without a single dissenting vote. Pet. App. 27a.

REASONS FOR DENYING THE PETITION

The petition raises three questions, only one of which actually challenges the Seventh Circuit's decision. The other two concern issues never argued

below, and petitioner also seeks advice on the effect of a hypothetical adverse disciplinary ruling. None of the questions requires review.

Petitioner first asserts that the Seventh Circuit's decision conflicts with the purported rule in the Fourth Circuit, which petitioner characterizes as providing that *Younger* does not apply to Commerce Clause challenges. Pet. 11-23 (citing *Harper* and *Life Partners v. Morrison*, 484 F.3d 284 (4th Cir.), *cert. denied*, 128 S. Ct. 708 (2007)). Petitioner also relies on two Third Circuit cases, but they too are inapposite and one is not even a Commerce Clause case. But *Harper* did not hold that comity never requires abstention in Commerce Clause cases, as indicated by the Fourth Circuit's own more recent case law. *Harper* merely held that abstention was inappropriate for a facial challenge to a state law that patently discriminated against interstate commerce. The lower courts here both properly distinguished *Harper* from petitioner's Commerce Clause challenge to the Act's facially neutral licensing and disciplinary regime. In short, the split that petitioner alleges is entirely illusory, and provides no ground for this Court's review. And at least four other circuits have consistently applied *Younger* abstention in Commerce Clause cases, belying petitioner's concerns about confusion on this issue.

Petitioner does not allege that its other questions implicate any split in authority. Rather, petitioner merely insists that this Court "should" decide if *Hicks* applies when the initial state proceeding is administrative. Pet. 23-28. But this Court has already decided that *Younger* applies to administrative proceedings that are judicial in nature (*Middlesex*

County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 433-34 (1982)), and there is no authority for the proposition that *Hicks* somehow would not apply in this context. On the contrary, other courts have followed *Hicks* under these circumstances.

Petitioner also invites this Court to decide a two-fold question that may never become ripe, again without alleging a circuit split: whether *Younger* will require petitioner to seek judicial review if the Department renders an adverse decision, and whether such a decision, if unreviewed, would have preclusive effect on petitioner's federal claim. These questions are not properly before the Court.

Lastly, other abstention principles would require affirmance of the dismissal here even if *Younger* would not. To address the merits of petitioner's Commerce Clause claim would require unnecessary guesses about Illinois law, which also would not be binding on Illinois tribunals. Moreover, abstention would avoid unnecessary adjudication of the constitutional question here, which may be obviated (or at least narrowed) when the Department or Illinois courts construe the Act. And general principles of equity provide yet another independent ground for affirmance, for petitioner has an adequate legal remedy in state court that precludes the award of the injunctive relief it seeks here. In any event, petitioner's Commerce Clause claim already has a federal forum in a closely analogous case: the Fifth Circuit, which is considering a judgment in petitioner's favor on an almost identical issue.

In sum, the petition fails to satisfy any of this Court's criteria for a grant of certiorari. It poses no

important question of law and the alleged circuit split is illusory. At bottom, petitioner merely contends that the Seventh Circuit misapplied settled principles governing *Younger* abstention to its Commerce Clause challenge to the pending disciplinary proceeding in this case. Certiorari should be denied.

I. There Is No Confusion, Much Less a Direct Conflict, Among the Circuits Regarding *Younger* Abstention in Commerce Clause Cases.

Petitioner alleges a split between the Seventh Circuit and the Fourth and Third Circuits and claims there is confusion after *NOPSI* over the importance of comity in *Younger* analysis for Commerce Clause claims. Pet. 11-23. Petitioner is mistaken. This Court and lower courts, including the Fourth Circuit, have held that comity requires abstention even in the context of a Commerce Clause claim. There is no confusion, let alone a direct circuit split, on this point.

A. The Court Has Consistently Approved Abstention for Commerce Clause Claims, Both Before and After *Younger*.

Long before *Younger*, the Court applied general abstention principles — avoiding unnecessary resolution of constitutional questions and "preliminary guesses" about local law — to approve abstention notwithstanding "the overriding national interests embodied in the Commerce Clause." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 103 (1944) (nonresident interstate business's challenge to state tax on "doing business" within State).

Even earlier, when approving abstention from a Commerce Clause challenge to a state criminal proceeding, the Court warned that "[a]n intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court." *Fenner v. Boykin*, 271 U.S. 240, 244 (1926). Instead, given the opportunity for review by this Court, "[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." *Id.* at 244.

To these general policy principles, *Younger* added two more: (1) "the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," unless that harm is "both great and immediate," and (2) comity, or "our Federalism," which requires "a proper respect for state functions . . . and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. at 44. *Younger* reiterated the general rule, "repeat[ed] time and again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions," absent "extraordinary circumstances," *e.g.*, a state law that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against

whomever an effort might be made to apply it." *Id.* at 45-53 (internal quotation marks omitted).

Although petitioner asserts that the Court has never addressed whether *Younger* abstention applies to Commerce Clause claims (Pet. 11), the Court in fact applied *Younger* in *Pennzoil*, where the plaintiff challenged enforcement of a state judgment on several grounds, including the Commerce Clause. 418 U.S. at 6 n.6. *Pennzoil*'s reasoning is instructive here: principles of comity and "proper respect for the ability of state courts to resolve federal questions" required deference to the state proceeding, in light of the State's important interest in its authority to enforce state court judgments. *Id.* at 13.

Pennzoil, *Spector Motor Serv.*, and *Fenner* thus foreclose petitioner's argument that the federal interest undergirding the dormant Commerce Clause necessarily precludes abstention.

B. Federal Courts Apply *NOPSI* Consistently When Analyzing *Younger* Abstention in Cases Involving Important Federal Interests, Including the Commerce Clause.

The Seventh Circuit's opinion is consistent with *NOPSI* and decisions by at least four other circuits applying *Younger* abstention in the face of a Commerce Clause claim. The decisions that petitioner asserts conflict with the Seventh Circuit's opinion do no such thing. Instead, they are straightforward applications of *Younger*'s criteria to the particular state statutes and interests at issue. Those decisions did not — and could not, in light of *Pennzoil* and the other cases cited above — hold that abstention is never required for a

Commerce Clause claim, as petitioner suggests. Pet. 23 (claiming that Fourth Circuit had "determine[d] that claims brought under the commerce clause are appropriately resolved in federal court"). Indeed, the Fourth Circuit itself more recently held that comity required abstention in a Commerce Clause claim. And the consistent decisions from four other circuits demonstrate no confusion on this point.

1. The Seventh Circuit's Decision Is Consistent With *NOPSI*, Which Forecloses Petitioner's *Per Se* Rule Barring Abstention in Commerce Clause Cases.

As noted above, the Seventh Circuit rejected petitioner's argument that its Commerce Clause claim precluded *Younger* abstention, relying on *NOPSI*'s rejection of the same argument, and stressed that the federal government has demonstrated no interest in regulating real estate brokerage services, a traditional state interest. Pet. App. 7a (quoting *NOPSI*, 491 U.S. at 364-65, which cited *Younger*, 401 U.S. at 53). The Seventh Circuit's reasoning is fully consistent with *NOPSI*.

NOPSI held that *Younger* abstention was inappropriate when a plaintiff challenged (on preemption grounds) a state action that was legislative rather than judicial, likening the case to "a facial challenge to an allegedly unconstitutional statute or zoning ordinance — which we would assuredly not require to be brought in state court." 491 U.S. at 372-73 (citing *Wooley v. Maynard*, 430 U.S. 705, 711 (1977)). Of importance here is that *NOPSI* also

clarified when a State's interest is sufficiently "important" to warrant *Younger* abstention.

NOPSI recognized that although "constitutional challenges to state action . . . call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action[,] . . . the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction." *Id.* at 365 (citing *Younger*, 401 U.S. at 53). In so doing, *NOPSI* echoed *Younger*'s caution that even the chilling effect of a criminal prosecution under a statute regulating speech "should not by itself justify federal intervention." 401 U.S. at 50 (distinguishing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

NOPSI also warned that *Younger* analysis does not permit even a "quick look at the merits," even when the federal claim appears to be "substantial." 491 U.S. at 372, 364-65. Moreover, *NOPSI* stressed,

> when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case — which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.

Id. at 365 (emphasis in original). *NOPSI* concluded that the State's action there could "hardly be deemed 'flagrantly' unlawful for purposes of a threshold [*Younger*] abstention determination," given the need for further factual development. *Id.* at 367.

Here, the Seventh Circuit correctly followed *NOPSI*'s instructions and did not accept petitioner's mere assertion that its Commerce Clause challenge required the federal courts to exercise jurisdiction. Instead, as *NOPSI* teaches, the court took into account the importance of the State's general interest in regulating real estate professionals, and indicated that the federal interest in protecting interstate real estate brokerage is only negligible, given that the federal government does not even partially regulate it. Pet. App. 7a-9a. And as in *NOPSI*, the Act cannot be deemed flagrantly unlawful for purposes of *Younger*, given the need for factual development of petitioner's claim.

2. The Circuit Courts' Consistent Application of *Younger* to Commerce Clause Claims Exhibits No Confusion Over *NOPSI*.

Petitioner implies that only the Fourth and Seventh Circuits have addressed whether comity requires abstention in a Commerce Clause case, and asserts that courts are confused about how to apply *NOPSI*. But at least four other circuits have approved *Younger* abstention in such a case. In short, petitioner's alleged split is illusory.

Thus, the Eighth Circuit relied on *NOPSI* to squarely reject the argument that *Younger* abstention was inappropriate due to the "inherently interstate nature" of a proposed securities transaction that ten States purported to regulate. *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1140, 1142 (8th Cir. 1990); *see also Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990). The court stressed that what mattered

was not the State's interest in the particular interstate transaction at issue, but rather the State's substantial, legitimate interest in protecting its insurance policyholders. 896 F.2d at 1144-45. More recently, the same court cited *NOPSI* and rejected the argument that the State's interest in enforcing consumer protection laws was insufficient for *Younger* purposes, finding that "*Younger* clearly applies despite the nature of the [plaintiffs'] claims," which included a Commerce Clause claim. *Cedar Rapids Cellular Tel., L.P., v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002). The court observed, however, that *NOPSI* left open the possibility of an exception to *Younger* for "facially conclusive" preemption claims, such as those that are "readily apparent" or involve matters that "clearly are under exclusive federal control." *Id.* at 880 (internal quotation marks omitted).

Similarly, in *Woodfeathers, Inc. v. Washington County, Or.*, 180 F.3d 1017 (9th Cir. 1999), the Ninth Circuit reversed an injunction issued in a Commerce Clause case, citing *Younger*. After holding that enforcement of solid waste laws implicated an important state interest, the court noted that its inquiry was limited to determining if the federal interest was "readily apparent," reasoning that to decide whether to abstain based on a determination about whether the state law was preempted "would render *Younger* a nullity." *Id.* at 1021. The court defined "readily apparent" to include, for example, an issue that this Court previously decided or a state law that fell under an express preemption provision. *Id.* at 1021-22; *see also Canatella v. State of California*, 404 F.3d 1106, 1112 (9th Cir. 2005) (rejecting argument that claim of patently unconstitutional state law,

standing alone, constituted "extraordinary circumstance" for *Younger* purposes).

The Tenth Circuit is in accord, based on an unpublished decision rejecting the argument that the state agency had no valid interest in regulating the plaintiffs in light of the dormant Commerce Clause. *Trans Shuttle, Inc. v. Pub. Utils. Comm'n*, 2001 WL 1355987 (10th Cir. 2001) (unpublished). The court's reason is instructive here:

> [t]his argument does no more than restate the central controversy. It is not so much an argument against the importance of the state's interests as it is a conclusion drawn from an earlier assumption that the [plaintiffs] are exempt from state regulation, an assumption that is under attack from [the state agency] and is currently being litigated in state court.

Id. at *5.

The Sixth Circuit agrees. It affirmed *Younger* abstention, even though one of the plaintiff's claims was based on the Commerce Clause, reiterating that there is "'no reason to analyze abstention cases involving a preemption claim differently than other abstention cases,'" so long as the state court has concurrent jurisdiction to decide the question. *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 967-68 (6th Cir. 1991) (quoting *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471 (6th Cir.1989)).

Given all these cases, in which the circuits applied *NOPSI* to Commerce Clause claims in the same way the Seventh Circuit did here, there is no confusion about *NOPSI*.

3. This Case Would Come Out No Differently in the Third and Fourth Circuits.

Petitioners cite cases from the Third and Fourth Circuits, claiming a conflict with the Seventh Circuit's decision here. Pet. 11-23. But those cases held that abstention was not required due to the particular state interests and the particular Commerce Clause claims at issue in those cases: both were facial challenges to state laws whose violation of the Commerce Clause was "readily apparent" or "facially conclusive," unlike petitioner's challenge here. Thus, the purported conflict is illusory. And to the extent that petitioner reads *Harper* and *Life Partners* as holding that a Commerce Clause claim always trumps abstention, it is wrong.

In *Harper*, the Fourth Circuit determined from the face of the state law that it was motivated by an illegitimate desire to restrict foreign access to the State's solid waste removal market. 396 F.3d at 355. Not surprisingly, the court reasoned that such obvious discrimination against interstate commerce was not an "important" state interest for *Younger* purposes. *Ibid.* Thus, *Harper* itself contemplates that only where the State's manifest interest is discrimination against interstate commerce does "the commerce power itself justify a narrower view of state interests in the abstention context." *Id.* at 357. And this reasoning is consistent with *Younger*, which held that abstention is not appropriate for challenges to state laws that are "flagrantly and patently violative of express constitutional prohibitions." 401 U.S. at 53. It is also consistent with *NOPSI*'s observation that facial

attacks are not proper candidates for abstention (491 U.S. at 372-73), as well as with the reasoning in the Sixth, Eighth, Ninth, and Tenth Circuit cases described above, which all recognized that *Younger* abstention is not required for a "facially conclusive" or "readily apparent" Commerce Clause challenge.

Of significance here is that *Harper* took pains to distinguish between a state interest in neutral police power regulations and a state interest in discrimination against interstate commerce, indicating that *Younger* abstention would have been appropriate if West Virginia's interest had in fact been to prevent improper disposal of solid waste. 396 F.3d at 354-55. Indeed, the court recognized that "federal judicial interference would 'disregard the comity' that Our Federalism requires [for] interests that the Constitution and our traditions assign primarily to the States," including "property law concerns" and "certain businesses historically under state oversight." *Id.* at 352-53. Thus, to the extent that petitioner sees *Harper* as a *per se* rule that comity never requires abstention for Commerce Clause cases, even when the state interest is a traditional one and not discrimination against interstate commerce, and even when a factual record must be developed (Pet. 23), *Harper* does not support that reading. And if there were any doubt that *Harper* is not a *per se* rule, the Fourth Circuit's more recent decision that comity required abstention in a Commerce Clause case, albeit not under *Younger* (*DIRECTV, L.L.C. v. Tolson*, 513 F.3d 119, 126 (4th Cir. 2008)), eliminates that doubt.

Petitioner also relies on *Life Partners*, but that decision adds little of moment, and is not inconsistent

with the Seventh Circuit's decision in any event. That case concerned a facial Commerce Clause challenge to state laws governing viatical settlements, and the court summarily affirmed the denial of *Younger* abstention in just seven sentences that did not even mention, much less apply, *NOPSI*. 484 F.3d at 300-01. Nor did *Life Partners* read *Harper* as a *per se* rule against abstention in Commerce Clause cases. Rather, the decision suggests that the Commerce Clause challenge to the insurance regulations at issue was "facially conclusive" for *NOPSI* purposes, and would have succeeded if not for Congress's express delegation to the States of the power to regulate insurance. *See id.* at 301. This reasoning, like that of *Harper*, is consistent with *Younger* and *NOPSI* (and the other cases described above), and in no way conflicts with the Seventh Circuit's decision here.

As explained above, the Fourth Circuit would have agreed with the Seventh Circuit that comity requires abstention here. Unlike the State's discriminatory interest in limiting access to the interstate market in *Harper* (and implicitly in *Life Partners*), the State's interest here is in regulating and disciplining unlicensed brokerage services to Illinois residents and for Illinois real property, a traditional state interest. And unlike the facial challenge in *Harper*, petitioner's challenge to the Act requires development of a factual record. Under these circumstances, the lower courts properly distinguished *Harper*. There is no conflict.

Petitioner's reliance on two Third Circuit cases is similarly misplaced. In *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), which is not a Commerce Clause case, the court held that abstention

was inappropriate for a claim concerning the Surface Transportation Board's exclusive jurisdiction. *Id.* at 309-10 & n.21. In so doing, *Hi Tech* characterized as mere dicta *NOPSI*'s reliance on *Younger* for the proposition that "the mere assertion of a substantial constitutional challenge to state action will not alone compel the exercise of federal jurisdiction" (*NOPSI*, 491 U.S. at 365), despite its own reliance on that very language in an earlier case. 382 F.3d at 306 (citing *Olde Discount Corp. v. Tupman*, 1 F.3d 202, 214 (3d Cir. 1993)). Instead, the court (like petitioner) relied on one of its own pre-*NOPSI* decisions: *Ford Motor Co. v. Ins. Comm'r of the Comm. of Penn.*, 874 F.2d 926 (3d Cir. 1989), which held that *Younger* abstention was inappropriate in a Commerce Clause claim because the State's interest in prohibiting affiliation with savings and loan companies was not sufficiently important for *Younger* purposes due to pervasive federal regulation of banking, especially savings and loan bailouts. *Id.* at 934-35. As with petitioner's Fourth Circuit authorities, nothing in these two Third Circuit cases indicates that the court would have decided that *Younger* abstention from petitioner's Commerce Clause claim was inappropriate. And because *Ford Motor Co.* pre-dates *NOPSI*, it is of questionable vitality in any event. Here, of course, petitioner did not assert that a federal agency has "exclusive," or even pervasive, authority over real estate brokerage. Indeed, as the Seventh Circuit pointedly stated, there is no federal regulation whatsoever in this area. Pet. App. 9a.

In sum, petitioner's alleged circuit split is entirely manufactured, for nothing in Third or Fourth Circuit jurisprudence establishes that *Younger* abstention would be inappropriate in this case, where petitioner

challenges a facially neutral statutory regime in an area that is traditionally governed exclusively by the States. Rather, petitioner seeks a complete overhaul of *Younger* abstention, under which *Younger* becomes a nullity whenever "core national interests" are at stake. Pet. 11. *Younger* and its progeny do not permit this result, and neither the Third nor the Fourth Circuit has adopted it.

II. *Hicks* Has Been Applied to Administrative Proceedings.

As petitioner admits, *Hicks* expanded the definition of "ongoing" for *Younger* purposes to include a state proceeding that commences before a proceeding of substance on the merits has occurred in the federal action (Pet. 24 (citing 422 U.S. at 349)), and *Middlesex* held that *Younger* applies when the state proceeding is an administrative one that is judicial in nature. Nevertheless, petitioner urges the Court to use this case to carve out an exception from *Hicks* for administrative proceedings. Pet. 23-28. But petitioner forfeited this claim by not raising it below. And even now, petitioner does not allege that there is any split in authority on this issue. In any event, no exception is warranted, especially here.

Although petitioner argues that it cannot be inferred from this Court's opinions that *Younger* applies when the later-filed initial state proceeding is administrative (Pet. 24 n.13), petitioner is mistaken. In *Ohio Civil Rights Comm'n v. Dayton Christian Schs.*, 477 U.S. 619 (1986), *Younger* applied because, among other things, the administrative proceeding there "began before any substantial advancement in the federal action took place" (*id.* at 627), as in *Hicks*.

Petitioner also ignores cases from other circuits in which *Hicks* was applied when an administrative proceeding commenced after the filing of the federal complaint but before any proceeding of substance on the merits in the federal case. One such decision is among petitioner's own authorities for the first question in the petition: in *Ford Motor Co.*, the Third Circuit applied *Hicks* and held that the state administrative proceeding, which was initiated *after* the federal complaint was filed but before any proceeding of substance on the merits occurred in the federal case, was "ongoing" for *Younger* purposes. 874 F.2d at 932 n.8. The Ninth Circuit has done so too. *Communications Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1016 (9th Cir. 1999) (applying *Younger* when federal plaintiff initiated state administrative proceeding three weeks after filing federal complaint but before district court had done anything of substance on the merits).

Undaunted by the lack of any contrary authority, petitioner instead stresses *Hicks*'s "distinctive and determinative condition of plaintiff-defendant privity" (Pet. 27), but that privity exists here in any event. Petitioner also complains about "substantial distinctions" between administrative proceedings generally and the criminal proceeding in *Hicks*, citing the State's "paramount interest" in criminal proceedings and the immediate attention given to constitutional claims, and contrasting an administrative proceeding's lack of (unidentified) "procedural safeguards," restricted discovery, and the limited record for judicial review. Pet. 25-28 & n.15. Yet the Third Circuit and the Ninth Circuit applied *Hicks* to later-commenced administrative proceedings,

implicitly finding such differences immaterial. Indeed, petitioner's concerns about discovery and the like are relevant to *Younger*'s "adequacy" inquiry, not the "ongoing" inquiry, and according to petitioner, its constitutional claim will be considered *de novo* if it seeks judicial review. Pet. 26 n.15. In fact, the Seventh Circuit recently examined this same system for judicial review in another case against the Department and concluded that it satisfies *Younger*'s "adequacy" inquiry. *Green v. Benden*, 281 F.3d 661, 666-67 (7th Cir. 2002).

As for petitioner's Scylla and Charybdis argument (Pet. 26 (citing *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)), petitioner is not a "hapless plaintiff." *Steffel* permits declaratory relief when a prosecution is merely threatened, whereas petitioner seeks injunctive relief against an ongoing prosecution that petitioner itself is trying to stall, thereby delaying state court resolution of its constitutional claim. This distinction is critical. *See Doran v. Salem Inc.*, 422 U.S. 922, 928-31 (1975) (holding *Younger* inapplicable for plaintiffs who complied with state law when threatened with prosecution but applying *Younger* for claim by plaintiff for whom criminal summons was issued just days after federal suit was filed); *Wooley*, 430 U.S. at 712 (finding *Younger* inapplicable where plaintiff sought injunctive relief against future prosecutions after being prosecuted three times in five weeks, and distinguishing a first threatened prosecution).

Nor are petitioner's criticisms unique to administrative actions begun after the filing of a federal complaint: they would apply with equal force to an indisputably "ongoing" administrative action

initiated the day before the filing of a federal complaint. Thus, it appears that petitioner objects to *Younger* abstention in *all* administrative proceedings, not just when *Hicks* applies. Indeed, petitioner's reliance on the dissent in *Hicks* for its criticism that *Hicks* turns *Younger*'s "ongoing" inquiry "on its head" (Pet. 27-28) could be asserted just as well against all state proceedings, including criminal ones. And as one of petitioner's own authorities indicates, *Hicks* is not an absolute bar to a federal forum. A plaintiff can avoid its effect by quickly obtaining a preliminary injunction and thereby moving the federal case "well beyond 'the embryonic stage' . . . ." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984).

In sum, for the first time in this litigation and without identifying any split in authority, petitioner urges an exception to *Hicks* for administrative proceedings. Petitioner cannot identify a single court that has found fit to adopt such a rule, and other courts have implicitly rejected it. Moreover, petitioner's reasons for this exception to *Hicks* would apply with equal force to administrative proceedings filed *before* the federal complaint, and perhaps even to all after-filed state proceedings. This invitation to adopt petitioner's novel position should be declined.

III. Petitioner's Remaining Questions — Whether *Younger* Will Require Petitioner to Pursue Judicial Review if the Department's Decision Is Adverse, and Whether That Decision Will Have Preclusive Effect If Petitioner Does Not Seek Review — Prematurely Ask This Court's Advice on Future Litigation Strategy.

Petitioner's third ground for seeking review, which petitioner also forfeited by not raising it in the Seventh Circuit, is a two-fold request for advice on how to handle a hypothetical, future contingency. Petitioner wants to know, in the event that the Department issues a decision adverse to it in the disciplinary proceeding, whether petitioner must seek judicial review of that decision and, if petitioner does not, whether that decision would have preclusive effect. Pet. 28-35. But the proceeding may result in a decision that petitioner's conduct did not violate the Act, or that the Act does not authorize the Department to exercise personal jurisdiction over it. Until the state proceeding runs its course, the third question presented is not ripe for the Court's review, and petitioner therefore is seeking advisory opinions on questions not properly before the Court. In any event, even if the question were not forfeited, and even if it were not premature, it does not warrant this Court's review.

A. The Seventh Circuit Did Not "Expand" *Younger* by "Mandating" Exhaustion Here.

Petitioner asserts that the Seventh Circuit held that petitioner must pursue judicial review of any

adverse administrative decision and thus is precluded from ever bringing its dormant Commerce Clause claim in federal court. Pet. 28-34. Petitioner mischaracterizes the opinion. The Seventh Circuit neither "extends" *Younger* nor "mandates" that petitioner pursue judicial review of any adverse administrative decision. Rather, it merely holds that the administrative proceeding here is "adequate" for *Younger* purposes because petitioner will have the opportunity to raise its constitutional claim in the event of any adverse administrative decision. Pet. App. 6a-7a.

Exhaustion of available state court review was addressed in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975), which held that "a necessary concomitant of *Younger* is that a party must exhaust his state appellate remedies before seeking relief in" federal court. Since then, the Court has consistently held that a party cannot circumvent *Younger* by choosing not to pursue available state appellate remedies. *See, e.g., Pennzoil*, 481 U.S. at 16-17. Citing *Huffman*, *Dayton Christian Schs.* held that the normal rule against exhaustion of administrative remedies in Section 1983 cases (*Patsy v. Fl. Bd. of Regents*, 457 U.S. 496 (1982)) was inapplicable in the *Younger* context because "the administrative proceedings [in *Dayton Christian Schs.*] are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest." 477 U.S. at 627.

Thereafter, when addressing the different question of whether a state proceeding is "ongoing" throughout its appellate court stages, *NOPSI* recognized that

because a State's trial-and-appeals process is unitary, a party that loses in state court may neither pursue a state court appeal while concurrently seeking a federal remedy *nor* forgo that appeal and then seek a federal remedy. 491 U.S. at 368. *NOPSI* reasoned that "for a federal court to disrupt [that unitary state process's] integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign." *Id.* at 369. *NOPSI* then assumed, without deciding, that *Huffman*'s rationale applies when an agency is the initial tribunal, and concluded that federal intervention, which is not permitted during the administrative phase, would not be permitted after it either. *Ibid.* In so doing, *NOPSI* relied on *Dayton Christian Schs.* and *Middlesex. Ibid.* n.4.

Thus, contrary to petitioner's view (Pet. 29-30), there is no inconsistency between *NOPSI* and *Dayton Christian Schs* on this point. Pet. 29-30. To find *Younger* inapplicable at this stage and allow the federal court to intervene mid-process "would demonstrate a lack of respect for the State as sovereign," as *NOPSI* warned. 491 U.S. at 369. It also threatens an advisory ruling on petitioner's Commerce Clause claim, for the administrative proceeding here could result in a decision that obviates, or at least narrows, the Commerce Clause inquiry. It would also require guessing about Illinois law, and Illinois tribunals (including the Department) would not be bound by those guesses.

Lastly, petitioner asserts that exhaustion should not be required when a plaintiff requests only prospective relief against future enforcement actions (Pet. 33), but petitioner's unsuccessful request to stay

the administrative proceeding here (Pet. App. 13a) means that it did not seek only prospective relief in federal court. Accordingly, this case does not present the issue on which petitioner seeks review. Also, petitioner's reliance on *Wooley* (Pet. 33) is misplaced. *Wooley* found *Younger* inapplicable to an action brought after, not during, a third prosecution in five weeks, all of which had resulted in adverse decisions that were not appealed, and the federal plaintiffs therefore were seeking purely prospective relief. 430 U.S. at 711 (distinguishing *Huffman*); *see also Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1227 (10th Cir. 2005) (approving plaintiff's pleading no contest in state prosecution and agreeing to pay resulting fines under protest to avoid dismissal under *Younger*).

In sum, even if petitioner's exhaustion question were properly preserved below, ripe for decision, and the subject of a split in authority (and it is none of these things), *NOPSI* and *Dayton Christian Schs.* already indicate that to permit petitioner to avoid *Younger* simply by sitting out judicial review after any adverse administrative decision would demonstrate a profound lack of respect for state sovereignty.

B. Petitioner's Request for Advice on the Preclusive Effect of an Unreviewed Administrative Decision Is Improper.

The Seventh Circuit was silent about whether any adverse administrative decision, if unreviewed, would have preclusive effect on petitioner's Commerce Clause claim. And because there is as yet no Department decision, adverse or otherwise, the preclusive effect of that decision remains unripe for resolution.

Nevertheless, petitioner criticizes the Seventh Circuit for the unremarkable observation that petitioner can raise its Commerce Clause claim on judicial review in state court, although petitioner also agrees (Pet. 26 n.15), and then seeks advice as to the res judicata effect of the Department's decision, if it is adverse and if petitioner does not seek judicial review. Pet. 30-34. Even if this question were ripe, it is not certworthy.

On section 1983 claims, this Court has held that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 799 (1986). The conflict that petitioner sees among cases from other jurisdictions, including a vacated Second Circuit decision and no *Younger* cases (Pet. 31-34), is a non-starter.

Plainly, petitioner's argument is with this Court, not the Seventh Circuit. It criticizes *Younger* as requiring federal courts to "shrug off" section 1983 claims, apparently believing that every section 1983 plaintiff has a right to be in federal court. Pet. 32-33 (citing *Mitchum v. Foster*, 407 U.S. 225 (1972), and *Felder v. Casey*, 487 U.S. 131 (1988)). Petitioner is wrong. Section 1983 merely provides a federal cause of action for the violation of a federal right established by a federal law or constitutional provision. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). It neither creates substantive rights nor mandates a federal forum. As for *Mitchum*, it held only that the Anti-Injunction Act does not bar claims brought under section 1983 (407 U.S. at 242-43), and

Felder held only that a state procedural law that conflicts with section 1983's purpose is preempted in *state* court actions (487 U.S. at 153). And in any event, petitioner already has a federal forum for its almost identical Commerce Clause challenge against Florida and California regulators, which is pending on appeal in the Fifth Circuit. *See, supra*, pp. 6-7 n.2.

IV. This Case Is an Exceptionally Poor Vehicle for Resolving the Questions the Petition Raises.

Even if petitioner had raised certworthy questions that were ripe and properly raised below, this case is not the vehicle for answering them.

The petition concentrates on comity, implying that it is the sole criterion for abstention, yet it ignores other policy considerations that provide alternative grounds for abstention here. Perhaps the most important is *Younger*'s instruction on "the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law," absent irreparable harm that is both great and immediate. *Younger*, 401 U.S. at 43-44. Here, petitioner has an adequate legal remedy in the state proceeding, so abstention would be warranted on general equitable principles.

Moreover, without abstention, or even if petitioner prevailed in its challenge to comity-based abstention, federal courts necessarily would have to guess about how to construe Illinois law, and that guess would not bind Illinois tribunals. *Spector Motor Serv.*, 323 U.S. at 103. With abstention, however, Illinois tribunals have the opportunity to construe the Act in a way that

obviates or narrows the constitutional question. *Pennzoil*, 481 U.S. at 11. Indeed, the state tribunals may resolve this case on state law grounds without reaching the dormant Commerce Clause claim, either in the administrative proceeding or on judicial review (or in petitioner's pending state mandamus case). If petitioner is allowed to pursue its constitutional claim in a federal forum, however, it will be impossible to be certain that enforcement of the Act truly requires a resolution of that constitutional claim. This is yet another basis for federal abstention in this case, quite apart from *Younger*.

Furthermore, petitioner already has a federal forum for its Commerce Clause challenge to other States' regulation of its activities, *i.e.*, the Fifth Circuit, which is reviewing the judgment on petitioner's almost identical Commerce Clause claim against California and Florida regulators. The Fifth Circuit's decision, if on the merits and adverse to petitioner, will have preclusive effect on its almost identical Commerce Clause claim against respondent. *United States v. Mendoza*, 464 U.S. 154, 158-59 & nn.3, 4 (1984). And if petitioner prevails in that case, the Fifth Circuit decision (while not preclusive against respondent) would be powerful persuasive authority on judicial review of any adverse Department decision.

In sum, petitioner identifies no true circuit split or conflict with the decisions of the Court, it did not preserve its current claims by raising them in the Seventh Circuit (with one exception), and some of its claims are not ripe. Moreover, given the several other grounds for affirmance, this case presents a poor vehicle for resolving any of the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO
Solicitor General
MARY ELLEN MARGARET WELSH*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2106

*Counsel of Record

April 25, 2008